

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CYNTHIA L. MAXWELL §
Plaintiff, §
§
V. § C.A. NO. C-04-478
§
JO ANNE B. BARNHART, §
§
Defendant. §

ORDER

This is a social security action filed pursuant to 42 U.S.C. § 1405. Pending is plaintiff's motion for award of attorney's fees under the Equal Access To Justice Act ("EAJA"). (D.E. 18).

A final judgment was filed on April 24, 2005 and entered on April 26, 2005. (D.E. 17). The Government has 60 days to appeal from the date of the entry of final judgment. Fed. R. App. P. 4(a)(1)(B). On May 27, 2005, plaintiff filed its motion seeking attorneys fees.¹

EAJA establishes that "a party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection," 28 U.S.C. § 2412(d)(1)(B). The term "final judgment" is defined in EAJA as "a judgment that is final and not appealable," 28 U.S.C. § 2412(d)(2)(G) (emphasis added); see also Briseno v. Ashcroft, 291 F.3d 377, 379 (5th Cir. 2002) (per curiam).

Plaintiff's motion is premature as the Government's time for filing any notice of appeal has not lapsed yet and thus is still appealable. Plaintiff may refile a timely motion for attorney's fees once the

¹ The motion itself is dated May 25, 2005, and there is a certificate of service indicating that it was served on the Government on May 25, 2005.

final judgment is not appealable. Accordingly, plaintiff's motion for attorney's fees, (D.E. 18), is DENIED without prejudice.

ORDERED this 20th day of June 2005.



BRIAN L. OWSLEY
UNITED STATES MAGISTRATE JUDGE